No. 98-470

In The

Supreme Court of the United States

October Term, 1998

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Whether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction?

PARTIES

Petitioner is the German company Ruhrgas AG ("Ruhrgas"). Ruhrgas was the defendant in the underlying action originally filed in Texas state court and removed to the United States District Court for the Southern District of Texas, Houston Division, and was the Appellee and Cross-Appellant in the Fifth Circuit Court of Appeals.

Respondents are Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S. Respondents were plaintiffs in the underlying litigation and were the Appellants and Cross-Appellees in the Fifth Circuit. Respondents are referred to herein as "the Marathon Plaintiffs."

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Ruhrgas states that no single company owns more than fifty percent of the voting shares of Ruhrgas, but under a temporary contractual relationship, Bergemann GmbH may exercise 59.8 percent of the voting rights. Furthermore, Ruhrgas has no direct non-wholly owned subsidiaries in the United States.

ABBREVIATIONS

J.A.	Joint Appendix
Pet. App.	Appendix to the Petition for Writ of Certiorari
MOC	Marathon Oil Company
MIOC	Marathon International Oil Company
Norge	Marathon Petroleum Norge A/S
MPCN	Marathon Petroleum Company (Norway)
R.	Record on Appeal. Citations to the appellate record will be in the form of: (vol. no.) R. at (page no.). For example, 1 R. at 250 refers to volume 1 of the record at page 250.
Ex.	Exhibits to documents in the appellate record. Some of the exhibits to documents in the record are included in expandable folders. These exhibits were not page numbered by the district clerk. Accordingly, any reference to page numbers will be to those numbers contained in the exhibits. Citations to such exhibits will be in the form of: Ex. (no.) to Doc. (no.) at (page no.). For example, Ex. 1 to Doc. 63 at 53 refers to Exhibit 1 in the folder for exhibits to Document 63 at page 53 of the exhibit.
S.R.	Supplemental Record. The Heimdal Gas Sales Agreement ("HGSA"), filed under seal, and Ruhrgas AG's Notice of Cross-Appeal are included in a supplemental record. The pages of the HGSA were not numbered by the district clerk. The HGSA contains numerous

ABBREVIATIONS – Continued

components, and each component contains individual page numbers. Accordingly, references to the HGSA contained in the Supplemental Record will be to various components of the document and to the page numbers of each part or sub-part, as follows:

- HGSA
- HGSA Appendix A1, A2, A3, B, C, D, E, F, G, H
- HGSA Amendment
- HGSA Amendment – Attachment 1, Attachment 2, Attachment 3

For example, "S.R., HGSA Appendix B at 4" refers to page 4 of Appendix B to the Heimdal Gas Sales Agreement contained in the Supplemental Record.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page(s)

TABLE OF AUTHORITIES – Continued

Page(s)

TABLE OF AUTHORITIES – Continued

OPINIONS AND ORDERS DELIVERED BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Fifth Circuit are reported in *Marathon Oil Co. v. Ruhrgas AG*, 145 F.3d 211 (5th Cir. 1998). Copies of the opinions are annexed to the certiorari petition as Appendix A, and are reprinted in the Joint Appendix ("J.A.") at 473, *et seq.*

The memorandum and order of the United States District Court for the Southern District of Texas granting Ruhrgas's Motion to Dismiss for lack of personal jurisdiction, denying Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, and denying the Plaintiffs' Motion to Remand and Ruhrgas's Motion to Dismiss on *forum non conveniens* grounds as moot (March 29, 1996) is not reported and is annexed to the certiorari petition as Appendix B, and is reprinted in the Joint Appendix at 436, *et seq.*

The order of the United States District Court for the Southern District of Texas dismissing the action for lack of personal jurisdiction (March 29, 1996) is not reported and is annexed to the certiorari petition as Appendix C, and is reprinted in the Joint Appendix at 455, *et seq.*

JURISDICTION

The opinion of the United States Court of Appeals was filed on June 22, 1998. Petitioner's petition for writ of certiorari was filed in the Supreme Court on September

18, 1998. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

I. The Transaction

This case arises out of an international commercial agreement involving the sale of natural gas produced from the Norwegian North Sea. The agreement, which is known as the Heimdal Gas Sales Agreement ("HGSA"), was negotiated in Europe and was executed in Norway in 1984 on the basis of a binding Heads of Agreement signed in 1981. Hoffmann Aff. ¶¶ 3, 8, 6 R. at 113; Sullenbarger Aff. ¶ 2, Ex. 2 to Doc. 39; Hoffmann Depo., Ex. 1 to Doc. 63 at 74-77, 83-85, 88, 90, 280; Enseling Depo., Ex. 4 to Doc. 65 at 51-52. As the seller under the HGSA, Marathon Petroleum Company (Norway) ("MPCN") has sold 70 percent of its share of the Heimdal Field gas production to a group of European companies, including Petitioner Ruhrgas. *Id.* Inasmuch as MPCN had and has no employees, the negotiation and execution of the HGSA and the performance thereunder was and is conducted by personnel of Plaintiffs Marathon Oil Company ("MOC") and Marathon International Oil Company ("MIOC"), MPCN's great-grandparent and grandparent corporations, acting on behalf of MPCN. Evans Depo., Ex. 1 to Doc. 65 at 23-25, 30; Bossley Depo., Ex. 2 to Doc. 65 at 42-43, 45, 48-49, 52-53, 59-60, 77-78. Ruhrgas and the other buyers purchase the gas from MPCN for resale into the European market. Eckert Aff. ¶ 3, 6 R. at 118; Ex. 6 to Doc. 64 ¶ 12. The HGSA contains a Norwegian choice-of-law clause and a broad arbitration clause providing for arbitration in Stockholm, Sweden under the arbitration rules of the International Chamber of Commerce. S.R., HGSA, at 100-02.

II. The Facts

In 1971, the Norwegian Government issued a license to Marathon Petroleum Norge A/S ("Norge"), which was then named Pan Ocean Norge A/S, and three other Norwegian companies "to explore for and produce petroleum" in the Heimdal area, located in the Norwegian North Sea. Ex. 56 to Doc. 64. In the mid-1970s, Norge assigned, by two pass-through agreements, all rights, benefits, obligations, and duties under the production license and a related operating agreement to MPCN, which at that time was named Pan Ocean Oil Corporation (Norway). Exs. 61 & 62 to Doc. 64. By way of these pass-through agreements, Norge transferred to MPCN *all* of its rights to explore for, produce, and sell Heimdal gas. *Id.*; Engzelius Depo., Ex. 3 to Doc. 64 at 59-60. Norge never had any involvement in the production or sale of Heimdal gas nor did it have any contacts or dealings with Ruhrgas. Engzelius Depo., Ex. 3 to Doc. 64 at 108-09.

In early 1981, a "Heads of Agreement" was negotiated exclusively in Europe and executed in Norway, in which MPCN committed to sell 70% of its 24% share of the Heimdal Field gas production to a group of European companies: The German companies Ruhrgas, Brigitta, Thyssengas, and Gelsenberg, the Dutch partly state-owned company Nederlandse Gasunie, the Belgian company Distrigaz, and the French state-owned company Gaz de France (collectively referred to as "Buyers"). Hoffmann Depo., Ex. 1 to Doc. 63 at 74-77, 83-85, 88, 90,

280.[1] The terms of the Heads of Agreement were later incorporated into a more detailed gas sales contract, the HGSA. Hoffmann Depo., Ex. 1 to Doc. 63 at 96.

The HGSA was negotiated exclusively in Europe and was executed by MPCN and the Buyers in Norway on March 2, 1984. Hoffmann Aff. ¶¶ 3, 8, 6 R. at 112-13; Sullenbarger Aff. ¶ 2, Ex. 2 to Doc. 39; Ex. 4 to Doc. 39. During the course of the contractual relationship between MPCN and the Buyers, MPCN and the Buyers held dozens of meetings, all but three of which took place in Europe.[2] Hoffmann Aff., ¶ 8, 6 R. at 112. A number of issues relating to the HGSA, in particular, the price of the gas and the hardship claims of the Buyers, were the subject of negotiations and disputes. *Id.* at 112. One dispute concerned the validity of the HGSA (including its price provisions), which arose out of the Belgian Government's refusal to approve the HGSA. Hoffmann Depo., Ex. 1 to Doc. 63 at 185. The dispute led to an arbitration proceeding against the Buyers initiated in 1987 by MPCN, which resulted in a September 1989 award favorable to MPCN (except as to its claims against the Belgian company Distrigaz). Hoffmann Aff. ¶ 7, 6 R. at 112; First

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[1] Gelsenberg and Distrigaz are no longer among the Buyers. Their share of MPCN's Heimdal quantities has been taken over by other Buyers.

[2] In 1987, six years after the conclusion of the Heads of Agreement and one year after the commencement of deliveries of gas under the HGSA, the first meeting outside of Europe took place at Marathon's Houston offices. Ex. 2 to Doc. 63; Hoffmann Aff. ¶ 8, 6 R. at 113. Two other meetings (in 1989 and 1990) also were held in Houston. *Id.*

Amended Petition ¶¶ 26-27; J.A. 30. The award was challenged in court in Stockholm by the Buyers other than Distrigaz, Hoffmann Aff. ¶ 7, 6 R. at 112, and the Buyers renewed their claim to entitlement to a price reduction under the hardship provision (Art. 6.8) of the HGSA. S.R., HGSA Amendment at 2. While the Stockholm proceedings were pending, negotiations resulted in a settlement of the parties' disputes, evidenced by an amendment to the HGSA executed in Germany on May 11, 1990, which, *inter alia*, amended the price provisions of the HGSA effective as of 1992. S.R., HGSA Amendment at 3-5 & Attachment 1. Pursuant to the Amendment, the Buyers then withdrew the proceedings challenging the arbitration award. HGSA Amendment at 6; Hoffmann Aff. ¶ 7, 6 R. at 112. Subsequently, MPCN initiated further disputes relating to the price under the amended HGSA, resulting in further negotiations exclusively in Europe until the filing of this lawsuit. Hoffmann Aff. ¶ 7, 6 R. at 112.

III. The Lawsuit

On July 6, 1995, MOC, MIOC, and Norge filed this action against Ruhrgas in a Texas state court. In their lawsuit, the Marathon Plaintiffs allege *inter alia* that Ruhrgas committed fraud by allegedly making misrepresentations in Europe concerning the price to be paid to MPCN for its Heimdal gas. J.A. 21, *et seq.* Although the claims relate to alleged wrongdoing concerning the price paid to MPCN for gas purchased under the HGSA, MPCN is not a plaintiff. The assertion of claims by MOC, MIOC, and Norge – and not MPCN – is a transparent attempt to circumvent the HGSA's arbitration clause. Ruhrgas vehemently denies the allegations.

IV. The Proceedings in the District Court

Ruhrgas timely filed its notice of removal to the United States District Court for the Southern District of Texas. J.A. 42. The removal was based on three independent grounds: (1) the dispute relates to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, and removal jurisdiction therefore exists under 9 U.S.C. § 205; (2) Norge (the only foreign plaintiff) was joined fraudulently and is not a real party in interest, and alienage jurisdiction therefore exists; and (3) the case raises questions of foreign and international relations that are incorporated into and form part of the federal common law. J.A. 43-48.

Ruhrgas then filed a Motion to Dismiss for lack of personal jurisdiction and, subject thereto, a Motion for Stay Pending Arbitration and a Motion to Dismiss on *forum non conveniens* grounds. J.A. 51; 6 R. at 197, 240. The Marathon Plaintiffs filed a Motion to Remand based on an alleged lack of subject-matter jurisdiction. J.A. 93.

The district court ordered discovery pertinent to the jurisdictional issues. J.A. 182. On March 29, 1996, after the parties had completed jurisdictional discovery and briefing, the district court granted Ruhrgas's Motion to Dismiss for lack of personal jurisdiction. J.A. 436, 455. The district court relied on Fifth Circuit authority holding that district courts have the discretion in appropriate circumstances to dismiss on personal-jurisdiction grounds before addressing subject-matter jurisdiction. J.A. 445.

V. The Appeal

On appeal, a three-judge panel of the Fifth Circuit, without reaching the issue of personal jurisdiction, found subject-matter jurisdiction lacking and vacated the judgment of the district court with instructions to that court to remand the case to state court. J.A. 458, *et seq.* After this Court denied Ruhrgas's petition for writ of certiorari, which was limited to the question whether subject-matter jurisdiction existed under 9 U.S.C. § 205, the *en banc* Fifth Circuit, on its own motion, granted rehearing *en banc*, thereby vacating the panel decision. J.A. 472. The case was argued orally to that court on May 18, 1998, and on June 22, 1998, the *en banc* Fifth Circuit, in a 9-to-7 decision, overruled the prior Fifth Circuit precedents relied on by the district court and adopted a mandatory rule requiring district courts to decide subject-matter jurisdiction before personal-jurisdiction in every removed case. 145 F.3d at 215-25, J.A. 477-502, Pet. App. A5-30. The Fifth Circuit vacated the district court's judgment dismissing the case for lack of personal jurisdiction, and remanded the case to the district court with instructions to take up the issue of subject-matter jurisdiction in the first instance.[3] 145 F.3d at 225, J.A. 502, Pet. App. A30.

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[3] The majority opinion states that the three-judge panel's opinion "has been vacated and thus is no longer binding precedent, . . . and we express no opinion on that issue [the question of subject-matter jurisdiction]." 145 F.3d at 225 n.23, J.A. 502, Pet. App. A30.

SUMMARY OF THE ARGUMENT

Two bedrock principles of jurisdiction support the power of a district court to dismiss for lack of personal jurisdiction without first determining its subject-matter jurisdiction. The first is that every district court has jurisdiction to determine its own jurisdiction. *United States v. United Mine Workers*, 330 U.S. 258, 290-91 (1947). The second is that both personal jurisdiction and subject-matter jurisdiction are essential elements of the district court's jurisdiction; if either is lacking, the district court may not adjudicate the merits of the case. *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 381-82 (1937). Given these principles, the question of which jurisdictional issue to address first – subject-matter or personal – is a matter that ought to be left to the sound discretion of the district court in the efficient management of its docket on a case-by-case basis.

Nothing in the Constitution or this Court's prior decisions supports the majority's conclusion that the due-process limitations on a federal court's power somehow are subordinate to the Article III limitations on a federal court's power. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 23 (1998), relied on heavily by the Fifth Circuit, provides no such support. In *Steel Co.*, this Court did not differentiate between subject-matter jurisdiction and personal jurisdiction, but stressed that "the requirement that *jurisdiction* be established as a threshold matter . . . is 'inflexible and without exception,' " and that " 'without *jurisdiction* the court cannot proceed at all in any cause.' " *Id.* at 1012 (quoting *Mansfield, C. & L.N.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) and *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). (emphasis added) This Court

repudiated the prior practice of some courts of appeals of " 'assuming' [subject-matter jurisdiction] for the purpose of deciding *the merits*." *Id.* (emphasis added)

As Judge Higginbotham noted in his dissent in this case, there is a "plain lack of relevance" of this principle to the issue presented in this case. 145 F.3d at 228 (Higginbotham, J., dissenting), J.A. 509, Pet. App. A37. Issues that go to the merits of a claim are quite different from issues of jurisdiction. Jurisdiction speaks to the power of the court to adjudicate the claim. A court may lack that power either because it does not have jurisdiction of the subject matter or because it does not have jurisdiction over the person of the defendant. *Employers Reinsurance*, 299 U.S. at 381-82. This Court's decision in *Steel Co.* stands for the sound proposition that before reaching the merits of a case the district court must have "jurisdiction." But "jurisdiction" encompasses both subject-matter jurisdiction and personal jurisdiction. *Steel Co.* simply does not speak to the question of which of two jurisdictional issues must be resolved first.

Federalism concerns do not require that district courts always decide subject-matter jurisdiction before personal jurisdiction in a removed case. The prior court of appeals' decisions addressing the question have properly approached federalism concerns on a case-by-case basis. *See Cantor Fitzgerald L.P. v. Peaslee*, 88 F.3d 152, 155-56 (2d Cir. 1996); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986). In the present case, the personal-

jurisdiction issue is "a relatively simple question of federal law," and "the Plaintiffs' opposition to federal subject-matter jurisdiction was a difficult one to address." 145 F.3d at 231, 233 (Higginbotham, J., dissenting), J.A. 518, 521, Pet. App. A46, 49. Under these circumstances, it is appropriate for a district court to exercise its discretion to decide personal jurisdiction first.

A discretionary rule is consistent with constitutional requirements, gives due consideration to federalism concerns, preserves the flexibility needed by the federal district courts in the management of their caseloads, and promotes judicial efficiency. Given the crowded dockets faced by district judges, the rule adopted by the Fifth Circuit, mandating that the district courts address difficult issues of subject-matter jurisdiction, even when federal law clearly mandates that the case be dismissed for lack of personal jurisdiction, will have a real, practical, and negative effect on the federal district courts. As Justice Breyer noted in his concurring opinion in *Steel Co.*, "to insist upon a 'rigid order of operations' in today's world of federal court caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost." *Steel Co.*, 523 U.S. at ___, 118 S. Ct. at 1021 (Breyer, J., concurring). Although this Court held in *Steel Co.* that the Constitution mandates that district courts decide jurisdictional issues before reaching *the merits*, there is no constitutional, statutory, or jurisprudential justification for a rigid order of decision when a district court is presented with two independent jurisdictional questions.

ARGUMENT

I. A Federal Court's Power to Determine Whether Personal Jurisdiction is Lacking is Not Dependent on the Existence of Subject-Matter Jurisdiction.

A federal court must have jurisdiction to decide the merits of a controversy. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 23, ___, 118 S. Ct. 1003, 1012 (1998). But a court always has jurisdiction to determine its own jurisdiction. *United States v. United Mine Workers*, 330 U.S. 258, 290-91 (1947). Then-Judge Breyer made the critical point in *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1st Cir. 1988):

> This technical argument, however, fails to recognize the protean quality of the word "jurisdiction." *Cf.* Maitland, "The Shallows and Silences of Real Life," 1 *Collected Papers* 467, 478 (1911). That word, at least sometimes, refers to a relation between a court and a specific type of judicial decision then under consideration. Courts that lack jurisdiction with respect to one kind of decision may have it with respect to another. . . . A court, for example, always has jurisdiction to consider its own jurisdiction.

Judge Easterbrook of the Seventh Circuit made the same point:

> "Jurisdiction" is an all-purpose word denoting adjudicatory power. A court may have power to do some things but not others, and the use of "lack of jurisdiction" to describe the things it may not do does not mean that the court is out of business. . . . [A] court has jurisdiction to determine its jurisdiction and therefore may

> engage in all the usual judicial acts, even though it has no power to decide the case on the merits.

Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077-78 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

This Court's decision in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), makes it clear that even though a federal court lacks subject-matter jurisdiction, it can impose sanctions under Civil Rule 11. *Willy*, of course, was a case in which jurisdiction had been asserted on the basis of a federal question, but the same principle applies to diversity cases – *e.g.*, *Chemiakin v. Yefimov*, 932 F.2d 124, 127 (2d Cir. 1991); *Wojan v. General Motors Corp.*, 851 F.2d 969, 971-73 (7th Cir. 1988) – and, as in *Willy* itself, to cases removed to federal court, *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839 (1st Cir. 1990), as much as to cases commenced there.

Rule 11 is only one example of the many things a court can do even if it ultimately is held to lack subject-matter jurisdiction. It can punish for contempt. *United States v. United Mine Workers*, 330 U.S. at 290-95; 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3537 (1984). As Judge Easterbrook's example shows, the court "may supervise discovery, hold a trial, and order the payment of costs at the end." *Szabo Food*, 823 F.2d at 1078.

Applying these principles, the district court had the inherent power to determine its "jurisdiction," which includes both subject-matter jurisdiction and personal jurisdiction. In *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 381-82 (1937), this Court held that a dispute or

controversy is not within the jurisdiction of a federal court if it lacks *either* subject-matter *or* personal jurisdiction. This Court rejected the petitioner's argument that personal jurisdiction was not an essential element of the court's jurisdiction as a federal court, stating:

> Each of these elements of jurisdiction was essential, and if any was wanting there was an absence of proper jurisdiction. The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel for the petitioner assumed that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit *in personam* . . . is an essential element of the jurisdiction of a district . . . court as a federal court, and that in the absence of this element, the court is powerless to proceed to an adjudication.

Id.[4] In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982), this Court confirmed

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[4] That was by no means new learning. In *Illinois Cent. R. Co. v. Adams*, 180 U.S. 28, 34 (1901), this Court wrote:

> Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists * * * if the plaintiff be a citizen of one state, the defendant of another, if the amount in controversy exceed $2,000, and the defendant be properly served with process within the district."

This formulation, expressly equating personal jurisdiction and subject-matter jurisdiction, was quoted with approval in *Venner v. Great Northern Ry. Co.*, 209 U.S. 24, 34 (1908), and in the *Employers Reinsurance* case, 299 U.S. at 382 n.10.

that "the validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter *and* the parties." (emphasis added) A federal court's inherent power to determine its jurisdiction therefore extends to both subject-matter jurisdiction and personal jurisdiction.

Steel Co., relied on heavily by the majority of the Fifth Circuit, is not to the contrary. In *Steel Co.*, this Court did not differentiate between subject-matter jurisdiction and personal jurisdiction, but stressed that "the requirement that *jurisdiction* be established as a threshold matter . . . is 'inflexible and without exception,' " and that " 'without *jurisdiction* the court cannot proceed at all in any cause.' " 523 U.S. at ___, 118 S. Ct. at 1012 (quoting *Mansfield, C. & L.N.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) and *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). (emphasis added) This Court repudiated the prior practice of some courts of appeals of " 'assuming' [subject-matter jurisdiction] for the purpose of deciding *the merits*." *Id.* (emphasis added)

As Judge Higginbotham noted in his dissent, there is a "plain lack of relevance" of this principle to the issue presented in this case. 145 F.3d at 228 (Higginbotham, J., dissenting), J.A. 509, Pet. App. A37. Issues that go to the merits of a claim are quite different from issues of jurisdiction. Because a federal court has the inherent power to determine its own jurisdiction, it is not necessary for the court to assume the existence of subject-matter jurisdiction in order to determine personal jurisdiction. Furthermore, although a federal dismissal for lack of personal jurisdiction precludes a state court from redeciding the

same personal-jurisdiction issue, *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-527 (1931), it does not act as an adjudication on *the merits*. FED. R. CIV. P. 41(b); *Kendall v. Overseas Development Corp.*, 700 F.2d 536, 539 (9th Cir. 1983); *cf. Costello v. United States*, 365 U.S. 265, 284-86 (1960) (dismissal order in question was a dismissal for lack of jurisdiction that did not operate as an adjudication on the merits).

This Court's decision in *Steel Co.* stands for the sound proposition that before reaching the merits of a case the court must have "jurisdiction." But "jurisdiction" encompasses both subject-matter jurisdiction and personal jurisdiction. *Steel Co.* simply does not speak to the question of which of two jurisdictional issues must be resolved first. The district court in this case had the inherent power to determine whether it had personal jurisdiction. The exercise of that power was not dependent on a prior adjudication of the existence of subject-matter jurisdiction.

II. The Constitution Does Not Require a Mandatory Sequencing of Jurisdictional Decisions.

A. The Fifth Circuit's Mandatory Rule Improperly Elevates Subject-Matter Jurisdiction Above Personal Jurisdiction and Erroneously Creates a Hierarchy of Jurisdictional Importance.

"[W]hen presented with two jurisdictional questions, the Court may choose which one to answer first." *Steel Co.*, 523 U.S. at ___, 118 S. Ct. at 1021 (Stevens, J., concurring). The Fifth Circuit held this pragmatic rule of judicial management inapplicable, elevating subject-matter jurisdiction above personal jurisdiction "in some hierarchy of

jurisdictional importance." 145 F.3d at 228 (Higginbotham, J., dissenting), J.A. 509, Pet. App. A37. As noted by Judge Higginbotham in his dissent, that conclusion is "untenable." *Id.* As discussed above, both subject-matter jurisdiction and personal jurisdiction are essential elements of a federal court's jurisdiction. *Employers Reinsurance*, 299 U.S. at 381-82; *Insurance Corp. of Ireland*, 456 U.S. at 701. Both are rooted in core constitutional precepts – subject-matter jurisdiction in Article III and personal jurisdiction in the Due Process Clause. *Insurance Corp. of Ireland*, 456 U.S. at 702.

The fact that personal jurisdiction may be waived does not mandate that subject-matter jurisdiction always be decided before personal jurisdiction. Waiver does not apply in the context of subject-matter jurisdiction because Article III limitations "serve institutional interests that the parties cannot be expected to protect." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986). On the other hand, the due-process limitation on personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland*, 456 U.S. at 702. Although the differences between the "institutional interests" underlying subject-matter jurisdiction requirements and the "individual liberty interests" underlying personal-jurisdiction requirements permit waiver of personal jurisdiction, but not subject-matter jurisdiction, those differences do not render the Article III limitations on jurisdiction of greater importance than due-process limitations, nor do they require a mandatory sequencing of jurisdictional decisions. If personal jurisdiction is challenged, a federal court must analyze both subject-matter

jurisdiction and personal jurisdiction before reaching the merits. Nothing in the Constitution or this Court's prior decisions mandates that a court faced with both personal and subject-matter jurisdiction challenges must always decide subject-matter jurisdiction first.

B. Federalism Considerations Do Not Require a Mandatory Sequencing of Jurisdictional Decisions.

The Fifth Circuit concluded that federalism issues require a mandatory sequencing of jurisdictional decisions in removed cases. The court held that a decision by a federal district court on personal jurisdiction in a removed case before reaching removal jurisdiction constitutes a "usurpation of the state courts' residual jurisdiction to adjudicate the personal jurisdiction question. . . ." 145 F.3d at 219, J.A. 486, Pet. App. A14.

In attempting to justify its "usurpation" theory, the Fifth Circuit reasoned that "in the removal context, where the plaintiff chose state court, that court's interests in adjudicating the issue of personal jurisdiction, absent federal subject-matter jurisdiction, must be given special consideration." 145 F.3d at 219 n.11, J.A. 486, Pet. App. A14. That reasoning, however, cannot be reconciled with the decision of a unanimous Court in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). In that case, the district court lacked complete diversity upon removal, and it erroneously overruled the plaintiff's objection to subject-matter jurisdiction. However, the lack of complete diversity later was cured by the dismissal of a nondiverse defendant following a settlement. After trial and a judgment

adverse to the plaintiff, the Sixth Circuit vacated the judgment based on the absence of subject-matter jurisdiction at the time the case was removed. In this Court, the plaintiff argued that the Sixth Circuit correctly vacated the judgment in order to preserve the plaintiff's choice of a state-court forum. *Id.* at 75. This Court rejected that argument and reversed the Sixth Circuit, noting that although the plaintiff's arguments were not without merit, they were overridden by "considerations of finality, efficiency, and economy." *Id.* at 75-77. Notwithstanding that the case should have been tried on the merits in state court, and notwithstanding that the plaintiff was deprived of his choice of a state-court forum, this Court affirmed the district court's judgment based on those "overriding" considerations. *Id.*[5] Yet, the Fifth Circuit's mandatory rule prohibits any weighing of those considerations.

That is not to say that federalism concerns are not relevant to the exercise of a federal court's discretion in determining which jurisdictional issue to take up first. To the contrary, in *Allen v. Ferguson*, 791 F.2d 611 (7th Cir. 1986), the Seventh Circuit properly held that on the facts of that case, federalism concerns required a decision on subject-matter jurisdiction before reaching personal jurisdiction, based on the nature of the issues presented and their relative difficulty. Specifically, the court held that

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[5] *Caterpillar* is an example of what Judge Higginbotham described in his dissent: "[I]t is inevitable in our dualistic but hierarchical system of federal and state courts that the state courts will occasionally, for efficiency's sake, be deprived of the opportunity to pass on certain matters otherwise available to them." 145 F.3d at 231, J.A. 518, Pet. App. A46.

"federalism concerns tip the scales in favor of ruling on the motion to remand" because in ruling on the personal-jurisdiction challenge made in that case, "the district court was required to delve into difficult questions of Illinois law," and the subject-matter jurisdiction challenge presented "a federal question of at least equal, if not less, difficulty. . . . " *Id.* at 616.

On the other hand, in *Asociacion Nacionale de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994), the court affirmed the district court's dismissal of a defendant for lack of personal jurisdiction, even though it found subject-matter jurisdiction lacking on the facts of that case. The court held that federalism concerns did not require reversal because the removal was not frivolous and the personal-jurisdiction challenge in that case raised purely federal constitutional issues. "[F]ederal intrusion into state courts' authority" therefore was "minimized." *Id.*

In *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155-56 (2d Cir. 1996), the Second Circuit noted that federalism concerns may require a decision on subject-matter jurisdiction before personal jurisdiction when the personal-jurisdiction issue presents a question of state law. The court nevertheless held that the district court properly dismissed the case for lack of personal jurisdiction under New York law without reaching subject-matter jurisdiction. *Id.* The court noted that it was "clear that the court did not have personal jurisdiction under New York law" and that the subject-matter jurisdiction challenge presented a "more difficult question" of state law. *Id.*

These cases illustrate that federal district courts can analyze federalism concerns in exercising their discretion on a case-by-case basis, subject to review by the appellate courts on an abuse-of-discretion standard. The fact that federalism concerns require that subject-matter jurisdiction be determined before personal jurisdiction in *some* removed cases does not justify the Fifth Circuit's non-discretionary rule requiring a particular sequencing of jurisdictional decisions in *all* removed cases regardless of the circumstances.

This Court has adopted a similar case-by-case analysis of federalism considerations in the abstention context. In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), this Court explained the principle underlying its abstention doctrines:

> Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, or the administration of a specialized scheme for liquidating embarrassed business enterprises, or the final authority of the state court to interpret doubtful regulatory laws of the state. These cases reflect a doctrine of abstention appropriate to our federal system, whereby the federal courts 'exercising a wide discretion' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary.

312 U.S. at 500-501. (citations omitted) The power to dismiss under the abstention doctrines derives from the discretion enjoyed by courts of equity. *Quackenbush v.*

Allstate Insurance Co., 517 U.S. 706, 727 (1996). This Court described the parameters governing the exercise of that discretion in *Quackenbush*:

> [The] exercise of this discretion must reflect 'principles of federalism and comity.' Ultimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action' that the State's interests are paramount and that a dispute would best be adjudicated in a state forum.

Id. (citations omitted)

In applying its abstention doctrines, this Court has emphasized that the resolution of abstention questions requires an analysis of the federalism considerations presented by a particular case. For example, in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*"), this Court held that under the *Burford* doctrine, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or when the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). The Court in *NOPSI* went on to note that the mere existence of a complex state administrative process or a potential

for conflict with state regulatory law or policy is not sufficient for *Burford* abstention; there must be undue federal interference with such a process presented by the facts of the particular case. *Id.* at 362.

This Court similarly has held that district courts must consider federalism issues on a case-by-case basis in determining whether to exercise jurisdiction over supplemental state-law claims. As this Court noted in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, ___, 118 S. Ct. 523, 534 (1997):

> Depending on a host of factors, then – including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims – district courts may decline to exercise jurisdiction over supplemental state law claims. . . . [W]hen deciding whether to exercise supplemental jurisdiction 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'

This Court's abstention and supplemental-jurisdiction decisions demonstrate that federalism considerations properly are evaluated by district courts on a case-by-case basis in deciding whether to retain jurisdiction. All of this illustrates the importance of the point Justice Black made when he defined "Our Federalism" in *Younger v. Harris*, 401 U.S. 37, 44 (1971):

> The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The

> Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National governments. . . .

A district court faced with both subject-matter and personal-jurisdiction challenges in a removed case should be permitted to analyze federalism considerations in light of the circumstances of the particular case, the nature of the issues presented, and the state interests at stake in exercising discretion as to which jurisdictional issue to take up in the first instance.

As shown, there is no constitutional, statutory, or jurisprudential basis for a rule requiring a mandatory sequencing of jurisdictional decisions in removed cases. Ruhrgas respectfully submits that this Court should reject the Fifth Circuit's mandatory rule requiring that district courts resolve subject-matter jurisdiction challenges before personal-jurisdiction challenges in every removed case and instead approve the discretionary rule applied by the federal courts prior to the Fifth Circuit's decision in this case. Familiar principles should guide the district courts in exercising their discretion in determining which jurisdictional question – subject-matter or personal – should be addressed first. The district court should consider whether the removal was frivolous. *Asociacion Nacionale*, 988 F.2d at 566-67. The district court should consider whether the personal-jurisdiction issue involves difficult questions of state law. *Id.*; *Allen*, 791 F.2d at 616; *Cantor Fitzgerald*, 88 F.3d at 155. The district court should analyze the relative difficulty and complexity of the personal-jurisdiction and subject-matter jurisdiction issues. *Allen*, 791 F.2d at 616; *Cantor Fitzgerald*, 88 F.3d at 155. In

that regard, the district court should consider whether the court necessarily will be required to resolve any personal-jurisdiction issue in deciding the subject-matter jurisdiction question. *See, e.g., Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994). In short, the district court should have the discretion to weigh all aspects of efficiency, economy, and comity in determining which of the jurisdictional challenges to take up first. This exercise of discretion should be reviewed on an abuse-of-discretion standard.

III. A Discretionary Rule Provides Flexibility to the District Courts in the Management of their Dockets and Promotes Judicial Efficiency.

District courts around the country are struggling to deal adequately with the vast numbers of cases brought before them. The rule announced by the majority of the court below requires district courts to resolve questions of subject-matter jurisdiction, no matter how complex and difficult they may be,[6] whenever that jurisdiction is

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[6] A significant number of subject-matter jurisdiction issues are enormously difficult and potentially protracted and may require the resolution of factual issues, *e.g.*, complete preemption, federal common law, fraudulent joinder. And it often is necessary for the federal courts to pass on state-law issues in order to determine their subject-matter jurisdiction. Fraudulent-joinder cases are but one example of this. The court must look to state law in determining the elements of a controversy in order to decide whether the jurisdictional amount is present. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352-353 (1961). And though federal law ultimately decides whether an absent party is "indispensable" so that its joinder would defeat jurisdiction, it is state law that, in a diversity case,

challenged in the more than 30,000 civil cases (as of fiscal 1997)[7] that are removed to federal court, even when the law clearly mandates that the case be dismissed for lack of personal jurisdiction. Since it is not obvious that there is a principled basis on which that rule can be confined to removed cases,[8] it might well extend to the more than

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determines what interest the outsider actually has. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 n.22 (1968).

[7] In fiscal 1997, there were 30,715 civil cases removed from state court to federal court and 209,124 original filings in the district courts. REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 44 (1997).

[8] 145 F.3d at 230 n.5 (Higginbotham, J., dissenting), J.A. 514, Pet. App. A42.

Suppose a diversity case commenced in federal court in which defendant moves to dismiss for want of personal jurisdiction and lack of subject-matter jurisdiction. The federal court would be required to apply state standards in deciding the personal-jurisdiction issue. *Arrowsmith v. United Press Intl.*, 320 F.2d 219 (2d Cir. 1963); 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1075 (1987). If the court decided the personal-jurisdiction question first, and dismissed on that ground, this would prevent plaintiff from bringing the same suit in the state court in that state, because the federal holding of no personal jurisdiction would be preclusive in the state case. *Insurance Corp. of Ireland*, 456 U.S. at 702 n.9. It is true that in this example plaintiff would not be deprived of a state forum it preferred, but the federal decision would still have denied the state courts what the majority below thought to be their entitlement "to their own, independent – and absent a controlling Supreme Court decision – even conflicting interpretation of their state's long-arm statute and of the minimum contacts requirements of the federal Due Process Clause." 145 F.3d at 218, J.A. 485, Pet. App. A13.

200,000 civil cases commenced in the district courts each year.[9]

The Fifth Circuit's rule is not in keeping with traditional notions of judicial restraint, pursuant to which federal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower or more easily decided ground. *See, e.g., Moor v. County of Alameda*, 411 U.S. 693, 715 (1973), in which this Court refused to decide "a subtle and complex question with far-reaching implications" because the case could be resolved on a simpler issue. And, as noted by Justice Breyer in his concurring opinion in *Steel Co.*, "[t]he Constitution does not impose a rigid judicial 'order of operations,' when doing so would cause serious practical problems. . . . [T]o insist upon a rigid 'order of operations' in today's world of federal court case loads that have grown enormously over a generation means unnecessary delay and consequent added cost." 523 U.S. at ___, 118 S. Ct. at 1021 (Breyer, J, concurring). Yet, the Fifth Circuit's mandatory rule does just that, adversely affecting the district courts' ability to manage their dockets efficiently.

In rejecting a flexible rule, the Fifth Circuit relied on its conclusion that "[a] discretionary rule may also create incentives for defendants to subvert the orderly scheme for removing cases by acting opportunistically," *i.e.*, by "manufactur[ing] a convoluted theory of federal subject-

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[9] *See* note 7, *supra*.

matter jurisdiction . . . and then tak[ing] advantage of a stricter interpretation of personal-jurisdiction requirements in federal court. . . . " 145 F.3d at 219, J.A. 486-87, Pet. App. A14-15. A virtually identical argument was rejected by this Court in *Caterpillar*. The plaintiff in *Caterpillar* argued that if the federal-court judgment against him were allowed to stand, "defendants will have an enormous incentive to attempt wrongful removals." 519 U.S. at 77. This Court rejected the argument, holding that it

> rests on an assumption we do not indulge – that district courts generally will not comprehend, or will balk at applying, the rules on removal Congress has prescribed. . . . The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal – a swift, and non-reviewable remand order, attended by the displeasure of a district court whose authority has been improperly invoked. The odds against any gain from a wrongful removal, in sum, render improbable [plaintiff's] projection of increased resort to the maneuver.

Id. at 77-78. (citations omitted)

Applying the rationale of *Caterpillar*, the Fifth Circuit's projection of maneuvering by defendants to remove cases to federal court improperly to take advantage of federal-court interpretations of personal-jurisdiction requirements is "improbable" and does not justify a mandatory rule that strips the district courts of the discretion to manage removed cases in the most efficient manner.

IV. This Case Exemplifies the Propriety of a Discretionary Rule and the Proper Exercise of Discretion by a Federal District Court to Decide Personal Jurisdiction First.

This case illustrates the merit of adopting a discretionary rule permitting district courts in appropriate circumstances to decide personal jurisdiction first in removed cases. This case also provides an example of the proper exercise by a district court of that discretion.

A. The District Court's Threshold Determination of Personal Jurisdiction Promoted Judicial Efficiency.

1. The Personal Jurisdiction Question Was Resolved Easily in Ruhrgas's Favor.

In its Motion to Dismiss, Ruhrgas contended that it lacked the requisite minimum contacts with Texas to support the exercise of jurisdiction by a Texas court. J.A. 51-92. Because the Texas long-arm statute, TEX. CIV. PRAC. & REM. CODE § 17.042, like that of many states, extends to the full reach of the Constitution's Due Process Clause, *Kawaski Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985), only the federal due-process issue was raised by the motion. J.A. 60-86.

The district court correctly determined that the due-process issue was straightforward and that personal jurisdiction in Texas clearly was lacking. The seven dissenting Fifth Circuit judges agreed, concluding that "as demonstrated below, the merits of Ruhrgas's challenge to personal jurisdiction could be resolved relatively easily in its favor." 145 F.3d at 233 (Higginbotham, J., dissenting), J.A.

522-23, Pet. App. A50-51. The simplicity of the personal-jurisdiction question is illustrated by the brief discussion of the pertinent facts set forth below.

The Marathon Plaintiffs' claims arise from a purely European transaction. The natural gas is produced from the Heimdal Field located in the Norwegian North Sea. First Amended Petition, 6 R. at 54-55, ¶¶ 14, 15, J.A. 25-26. The "Heads of Agreement," which was signed in 1981 and concerned the sale of gas to the Buyers in Europe, was negotiated and executed in Europe. Hoffmann Depo., Ex. 1 to Doc. 63, at 74-77, 83-85, 90; Hoffmann Aff., ¶ 4, 6 R. at 113. The negotiations leading to the execution in 1984 of the HGSA (the more detailed agreement contemplated in the Heads of Agreement) were conducted in Europe. Hoffmann Aff. ¶ 8, 6 R. at 111-12; Sullenbarger Aff. ¶ 2, Ex. 2 to Doc. 39; Ex. 4 to Doc. 39. The HGSA was signed in Europe. *Id.* Dozens of meetings were held during the course of the contractual dealings, all but three of which were held in Europe. Hoffmann Aff. ¶ 8, 6 R. at 111-12. The HGSA expressly provides that it is governed by Norwegian law, and it provides for arbitration in Stockholm, Sweden. S.R., HGSA, at 100-02. The gas is resold in Europe. Eckert Aff. ¶ 3, 6 R. at 117; Ex. 6 to Doc. 64 at ¶ 12. Most of the payments for the gas were made to MPCN in Europe. Hoffmann Aff. ¶ 4, 6 R. at 113. No payments were made in Texas. *Id.*

Europe was the focus of the transactions and activities out of which this lawsuit arises. In fact, the Marathon Plaintiffs expressly allege in their First Amended Petition that Ruhrgas's alleged wrongful acts "were (and are) part of a single ongoing plan aimed at controlling the

Western European gas market. . . ." First Amended Petition, 6 R. at 47, ¶ 34, J.A. 33. (emphasis added) Ruhrgas could not have reasonably anticipated that it would be haled into court in Texas to defend against claims arising out of its purchase of Norwegian gas for resale in Europe, based on allegations of wrongful conduct purportedly designed to monopolize the Western European gas market. Personal jurisdiction in Texas therefore does not exist. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (ultimate inquiry is whether defendant's contacts with the forum are such that it should reasonably anticipate being haled into court there). This conclusion would be inevitable even in the absence of the HGSA's Norwegian choice-of-law clause and the arbitration clause providing for arbitration in Sweden. However, these clauses buttress the district court's conclusion that it lacked personal jurisdiction over Ruhrgas. *See Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1069 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984). The "mere fortuity" of the presence of MOC and MIOC in Texas[10] provides no basis for a contrary conclusion. *Jones v. Petty-Ray*, 954 F.2d at 1069; *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987).

In the district court, MOC and MIOC relied on three meetings held at Marathon's offices in Houston. J.A. 229-34. The first Houston meeting occurred in 1987, more

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[10] Sometime after MPCN committed to sell the gas to the Buyers in the Heads of Agreement, MOC and MIOC moved their offices from Ohio to Texas. 3 R. at 992 n.11, J.A. 239.

than six years after execution of the Heads of Agreement and one year after the commencement of deliveries of gas under the HGSA. Ex. 2 to Doc. 63. The other two Houston meetings took place in 1989 and 1990. *Id.* As correctly noted by the district court, "[t]he plaintiffs' designated representative who attended all three of the Houston meetings . . . was unable to recall any discussion at the Houston meetings concerning the funding arrangement between the Plaintiffs and MPCN," and "was not even able to recall any false statements made by Ruhrgas at the Houston meetings." J.A. 449, Pet. App. B14.[11] Furthermore, it was undisputed that the meetings in Houston were between Ruhrgas and the other Buyers and Marathon representatives acting on behalf of MPCN,[12] and that the meetings concerned the HGSA,[13] which was governed by Norwegian law and which contained an arbitration clause providing for arbitration in Sweden. The district court correctly concluded that "Ruhrgas was in Houston due to the contract with MPCN and could only expect to have to engage in arbitration in Sweden." J.A. 450, Pet. App. B15.

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[11] *See* Bossley Depo., Ex. 2 to Doc. 65 at 61-63.

[12] Plaintiffs' designated representative confirmed in his deposition that in all of the meetings, the Marathon personnel were acting on behalf of MPCN, which had no employees of its own. Bossley Depo., Ex. 2 to Doc. 65 at 42-43, 45, 48-49, 52-53, 59-60, 77-78. He described the first Houston meeting as "a meeting . . . between representatives of the consortium and individuals who would have been there representing Marathon Petroleum Company (Norway)." *Id.* at 42-43. The witness similarly confirmed that the Marathon representatives attended the other two meetings on behalf of MPCN. *Id.* 53-54, 59-60.

[13] Ex. 2 to Doc. 63.

With respect to Norge's claims, the personal-jurisdiction question likewise was easily resolved in Ruhrgas's favor. It is undisputed that Ruhrgas never dealt with or contacted Norge. Engzelius Depo., Ex. 3 to Doc. 64 at 108-09. Norge alleged that Ruhrgas damaged the value of a Norwegian production license. J.A. 33. Norge's claims are grounded on (1) alleged participation by Ruhrgas in alleged breaches by Statoil (Norway's 100% state-owned oil company) of purported fiduciary duties allegedly arising out of the Heimdal Field operating agreement, and (2) alleged tortious interference with MPCN's efforts to secure other European buyers for Heimdal gas. J.A. 35-38. Norge is a European corporation headquartered in Norway. Engzelius Depo., Ex. 3 to Doc. 64 at 12-15, 18-20; Engzelius Decl. ¶ 3, 5 R. at 307. There is no "Texas connection" to Norge's claims and the Marathon Plaintiffs never have asserted any Texas connection to those claims.

These facts demonstrate that "the merits of Ruhrgas's challenge to personal jurisdiction could be resolved relatively easily in its favor." 145 F.3d at 233 (Higginbotham, J., dissenting), J.A. 523, Pet. App. A51.

2. The Subject-Matter Jurisdiction Challenge Raised Difficult Questions.

In contrast, the subject-matter jurisdiction questions presented by the notice of removal and the motion to remand raised difficult and complex issues of law. For example, one of Ruhrgas's bases for removal of the case was its contention that Norge (the only alien plaintiff) was fraudulently joined to defeat federal jurisdiction. J.A.

299-316. Ruhrgas's fraudulent-joinder argument was based in part on the fact that Norge assigned its rights under the Heimdal field production license to MPCN in the 1970s, retaining only the possibility of reacquiring an interest in the license at some future date in the event of a default by MPCN. J.A. 299-308. Norge's chief executive officer and general manager acknowledged that Norge has not held the rights to explore for, produce, and market Heimdal gas since the assignment of the rights under the production license to MPCN in the 1970s.[14] He also acknowledged that the rights to the license may never revert to Norge.[15] As the extensive briefing filed in the district court demonstrates,[16] the proper classification of Norge's alleged reversionary interest was important to the state-law question[17] whether Norge holds a sufficient interest to entitle it to sue for any alleged damage to the license. The three-judge Fifth Circuit panel that originally decided the appeal concluded that these questions concerning the proper characterization of Norge's alleged property interests were "difficult." 115 F.3d at 319, J.A. 466.

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[14] Engzelius Depo., Ex. 3 to Doc. 64 at 59-60.

[15] *Id.* at 59-60, 85-91.

[16] *See* J.A. 299-308, 355-66.

[17] The Fifth Circuit panel noted that the resolution of this question may require application of Norwegian law. 115 F.3d at 319, J.A. 466. However, "[i]n the absence of sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the modern view is that the law of the forum should be applied." *Cantieri Navali Riuniti v. M/V Skyptron*, 802 F.2d 160, 163 n.5 (5th Cir. 1986) (quoting *Symonette Shipyards Ltd. v. Clark*, 365 F.2d 464, 468 (5th Cir. 1966)).

Ruhrgas's removal also was grounded on its contention that Plaintiffs' claims relate to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2115, 330 U.N.T.S. 38 (the "Convention"), and that removal jurisdiction therefore exists under 9 U.S.C. § 205. J.A. 43-46. Although the district court determined that Plaintiffs were not bound to arbitrate their claims, 4 R. at 607, that determination is not dispositive of the removal-jurisdiction question presented by Section 205. The statute provides for jurisdiction over claims which are "related to" an arbitration agreement falling under the Convention. 9 U.S.C. § 205. Judge Higginbotham noted in his dissent that a "mountain" of *amicus* filings was submitted to the Fifth Circuit on the Convention issue,[18] that it "raised an issue of first impression in this circuit," and that the question was "a difficult one to address, implicating novel questions of law in this circuit." 145 F.3d at 233 (Higginbotham, J. dissenting), J.A. 521, Pet. App. A49.

Additionally, Ruhrgas relied on the federal common law as an additional basis for federal jurisdiction. J.A. 47-48, 316-24. Ruhrgas contended that Plaintiffs' claims raise substantial questions of foreign and international relations. *Id.* For example, the First Amended Petition alleges that Ruhrgas conspired with Statoil, the 100% state-owned Norwegian oil company, to monopolize the

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[18] *See* the Fifth Circuit docket entries at J.A. 17-19. The Federal Republic of Germany also submitted an amicus curiae brief to the district court that addressed jurisdiction under 9 U.S.C. § 205. J.A. 206-11.

Western European gas market. J.A. 22-25, 33. Plaintiffs allege that Statoil "negligently misrepresented or fraudulently misrepresented" facts and committed "breaches of fiduciary duties." J.A. 32, 36-7. These allegations call into question official Norwegian policy decisions concerning Norwegian natural resources. At the time this case was pending in the district court in 1995 and early 1996, there was little precedent providing clear guidance on the resolution of those issues.[19] *See* J.A. 321-24, 366-70.

3. The Subject-Matter Jurisdiction Challenge Necessarily Required the District Court to Address Personal Jurisdiction.

The foregoing discussion demonstrates that the district court properly concluded that it was far more efficient to resolve the personal-jurisdiction question than the subject-matter jurisdiction issues presented by the

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[19] Shortly before the issuance of the panel opinion in this case, the Fifth Circuit decided *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), which addressed the circumstances in which the federal common law of foreign relations will be applied by the federal courts. In *Torres*, the Fifth Circuit held that the federal common law applied to the action because it struck "at Peru's sovereign interests by seeking damages for activities and policies in which the government has been actively engaged." *Id.* at 543. Although the panel opinion in this case rejected this basis for jurisdiction based on the intervening decision in *Torres* (without the benefit of briefing on the issue by the parties), the panel failed to address the First Amended Petition's direct allegations of wrongful conduct by an arm of the Norwegian government. 115 F.3d at 320, J.A. 466-68. The *en banc* Fifth Circuit vacated the panel's conclusions with regard to subject-matter jurisdiction and they are no longer binding. 145 F.3d at 225, n.23, J.A. 502, Pet. App. A30.

motion to remand, and that considerations of economy and efficiency favored a dismissal of the case for lack of personal jurisdiction without reaching the difficult subject-matter jurisdiction questions. Yet, an additional efficiency concern supported the district court's exercise of its discretion. The question of personal jurisdiction as to Norge's purported claims overlapped with the fraudulent-joinder issue raised by Ruhrgas in support of subject-matter jurisdiction. In a case against a foreign defendant, an important part of a fraudulent-joinder analysis is whether there is any possibility that the foreign defendant – Ruhrgas – may be subject to personal jurisdiction in the forum state on the claims of the foreign plaintiff – Norge. *See, e.g., Nolan v. Boeing Co.*, 736 F. Supp. 120, 122-23 (E.D. La. 1990). Considerations of judicial economy and efficiency are particularly compelling when, as in this case, the personal-jurisdiction analysis is relevant to the district court's determination of subject-matter jurisdiction. *Villar*, 990 F.2d at 1494 (upholding exercise of discretion when "the district court must necessarily address the issue of personal jurisdiction regardless of which motion it addresses first"). The relevance of the Norge personal-jurisdiction question to the fraudulent-joinder analysis provides further support for the district court's exercise of discretion to reach personal jurisdiction first in this case.

B. Federalism Concerns Did Not Require the District Court to Decide Subject-Matter Jurisdiction First.

Every relevant consideration in the federalism analysis supports the district court's exercise of discretion in

this case. Unlike *Allen v. Ferguson*, 791 F.2d at 616, there were no difficult issues of state law raised by Ruhrgas's personal-jurisdiction challenge. Ruhrgas's motion to dismiss under Rule 12(b)(2) raised only federal due-process issues. J.A. 60-86. Therefore, "federal intrusion into state courts' authority" was "minimized." *Asociacion Nacionale*, 988 F.2d at 566-67. Not only was Ruhrgas's removal not frivolous, it raised subject-matter jurisdiction issues that all sixteen judges of the Fifth Circuit characterized as novel. 145 F.3d at 225, J.A. 502, Pet. App. A30; 145 F.3d at 233 (Higginbotham, J. dissenting), J.A. 521, Pet. App. A49. As in *Cantor Fitzgerald*, 88 F.3d at 155-56, the personal-jurisdiction issue was more easily resolved than the issues raised by the motion to remand. As in *Villar*, 990 F.2d at 1494, resolution of the subject-matter jurisdiction questions necessarily would have required the district court to address personal jurisdiction as to Norge's claims. Under these circumstances, federalism concerns "run up against . . . overriding . . . considerations of . . . efficiency and economy" that are "overwhelming." *Caterpillar*, 519 U.S. at 75.

CONCLUSION

For the foregoing reasons, Ruhrgas prays that the judgment of the Fifth Circuit be reversed and that the Judgment of the district court be affirmed,[20] or in the alternative, that the case be remanded to the Fifth Circuit for further proceedings.

[20] Ordinarily the appropriate disposition would appear to be a remand to the Fifth Circuit to determine if the district court erred in finding no personal jurisdiction. But here it is so clear that personal jurisdiction does not exist that all seven of the Fifth Circuit judges who looked at the simplicity of the personal-jurisdiction question concluded that "as demonstrated below, the merits of Ruhrgas's challenge to personal jurisdiction could be resolved relatively easily in its favor." 145 F.3d at 233 (Higginbotham, J., dissenting), J.A. 522-23, Pet. App. A50, 51.

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